UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	GOVERNMENT RESPONSE TO
v.	)	DEFENDANT'S MOTION
	)	PURSUANT TO FED. R. CIV. P. 59(e)
JEFFREY R. MacDONALD,	)	
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this Response to the Defendant's Motion to Alter or Amend Judgment and Incorporated Memorandum of Law (DE-357), and respectfully requests the Court deny the motion because: (1) any additional evidence regarding the credibility of Michael Malone not previously presented to this Court does not change the basis of the Court's ruling; and (2) nothing in the motion calls into question the Court's previous consideration and rejection of a certificate of appealability. In support, the Government shows unto the Court the following:

I. Procedural background

The Government incorporates by reference the procedural history of the 44-year litigation in this case as set forth in the Court's Order of July 24, 2014 (DE-354 at 2-13), and will supplement that only as necessary to aid in understanding the context of the pending motion.

II. Requirements of Fed. R. Civ. P. 59(e)

"A Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an

intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012) (citing Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007)). "It is an extraordinary remedy which should be applied sparingly." Id. (citing EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997)). Although the defendant does not explicitly state a basis for his motion pursuant to Rule 59(e), he seems to be relying on the second prong, i.e., that the information regarding Michael Malone contained in the July 2014, DOJ OIG report[1] ("2014 OIG Report") constitutes new evidence not available at "trial." MacDonald argues no intervening change in law, nor does he submit that the district court made a clear error of law that must be addressed to prevent manifest injustice.

As discussed more thoroughly *infra*, the information regarding Michael Malone's credibility has been known to both the defendant and the Court since at least 1997, and therefore is not new. Although the 2014 OIG Report contains additional facts regarding Malone's credibility in specific cases that were not discussed in the 1997 OIG Report,[2] the new report does not discuss any analysis he performed in this case, and therefore it would not change the outcome of this Court's analysis regarding Malone.[3] See DE-354 at 69-71, 127, 136.

The effect of Michael Malone on this case, therefore, has been thoroughly litigated. "[A]

[1] DE-357-1, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* by the U.S. Department of Justice, Office of the Inspector General, July 2014.

[2] *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*. DE-49-3, filed April 22, 1997.

[3] Regarding the MacDonald case, the 2014 OIG Report simply states that, "Malone became well known to many judges and the law enforcement community because of his forensic work on several high profile cases, including…Jeffrey MacDonald, a Green Beret Army surgeon convicted of murdering his wife and children at Fort Bragg, North Carolina . . . ." DE-357-1 at 45. The actual passage in the report is very different from what the defendant claims it says, i.e., that "the report itself noted Malone gained fame through his work in helping to secure Dr. MacDonald's *conviction*." DE-357 at 4-5 (emphasis added). Malone did not testify at the MacDonald trial and, therefore, did not help to secure the defendant's conviction. His only role is this case was to perform analysis of certain hairs and fibers in relation to the 1990 habeas litigation. DE-48-1 at ¶ 9. There is no other mention of MacDonald in the 146-page 2014 OIG Report.

motion to alter or amend judgment is not meant to "provide a vehicle for a party to undo its own procedural failures, and certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." Hutcherson v. Krispy Kreme Donut Corp., 803 F.Supp. 2d 952, 956 (SDIN 2011) (citing U.S. V. Resnick, 594 F.3d 562, 568 (7th Cir. 2010)). "In other words, a Rule 59(e) motion does not give parties a "second chance" to prevail on the merits." Id. (citing Fannon v Guidant Corp., 583 F.3d 995, 1002 (7th Cir. 2009)). MacDonald raised the issues involving Michael Malone in several filings, discussed *infra*. He should not now receive a second chance to litigate the Malone issues simply because additional information has come to light regarding cases other than the one at bar.

Given the broad "evidence as a whole" mandate from the Fourth Circuit,[4] the Government does not object to this Court considering the 2014 OIG Report as part of the evidence as a whole in determining whether to alter or amend its Order. Such consideration of these facts by the Court, however, should not change the Court's previous analysis of the issues, nor does it warrant an amendment to the judgment as requested by the defendant.

III. The issues regarding Michael Malone's credibility are not new

As demonstrated below, MacDonald was aware of the allegations regarding Michael Malone's credibility as early as 1992 and at least since 1997. Even if the Court were to consider the information in the 2014 OIG Report to be "new," it is not "new evidence not available at trial" for the purposes of a Rule 59(e) motion, as noted in Mayfield, because it would not have affected the trial outcome. As stated, Malone did not testify at the 1979 trial. Therefore, no

[4] United States v. MacDonald, 641 F.3d 596, 612-15 (4th Cir. 2011).

"new" information about his credibility could possibly have affected that trial.[5] Moreover, the information in the 2014 report is merely cumulative of other information affecting Malone's credibility that has long been known to both the defendant and this Court. The state of Malone's credibility has been considered, and ruled upon, by this Court. The additional facts contained in the 2014 OIG Report have no bearing on the conclusions in the Court's July 24 Order.

A. The defendant has been challenging Malone's credibility since 1992

1. 1992 appeal and 1997 Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery

In 1992, during his appeal from the denial in 1991 of his third § 2255 motion, MacDonald cast doubt on the credibility of Malone by citing texts by Dembeck and Stout purportedly contradicting Malone's claim that saran fiber was not used in cosmetic wigs for humans. See United States v. MacDonald, 161 F.3d 4, 1998 WL 637184 (4th Cir. 1998) (noting that this point had been argued to the Court of Appeals in oral argument and written submissions in the 1992 appeal, United States v. MacDonald, 966 F.2d 854 (4th Cir. 1992)). See also United States v. MacDonald, 979 F.Supp. 1057, 1064 (EDNC 1997).

On April 22, 1997, in the Affidavit of Philip G. Cormier No. 2, filed in support of the defendant's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery (DE-49 and DE-46, respectively), the defense discussed the DOJ Inspector General's report *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, dated April 15, 1997. MacDonald questioned the reliability of any examination conducted by Michael Malone in the MacDonald case, and discussed the scientific limitations of microscopic hair analysis generally. DE-49 at ¶¶ 5-20, 27, 52. Cormier's affidavit also

[5] The word "trial" in this context may be read to refer to the evidentiary hearing in this habeas litigation held in September 2012, as opposed to the 1979 criminal trial. If it is so read, while it is true that the July 2014 report was not available at that hearing, it would clearly not have affected the outcome of the hearing.

questioned any pre-DNA microscopic hair associations. Id. at 27-37. This Court subsequently considered these claims and denied them. MacDonald, 979 F.Supp 1037 (EDNC 1997), see also DE-354 at 70-71.[6]

2. 2006 Petitioner's Motion to Expand the Record

On March 23, 2006, MacDonald filed Petitioner's Motion Pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings, To Expand the Record To Include The Itemized Authenticated Evidence Set Forth Herein ("Motion to Expand the Record"). DE-124. The Statement of Itemized Material Evidence set forth allegations that Malone had committed fraud on the court in his Supplemental Affidavit of May 21, 1991 (DE-27), concerning the uses of saran fibers, and requested that it be considered along with the Britt claim as part of the "evidence as a whole." DE-126 at 17-21. Although this Court denied the Motion to Expand the Record (DE-150), the Fourth Circuit reversed and remanded, requiring that the evidence regarding these fibers be considered as part of the "evidence as a whole." United States v. MacDonald, 641 F.3d 596, 614 (4th Cir. 2011), and this Court has done so. DE-354 at 66-71, 135-136, 165, 168.

3. 2011 Request for Hearing

On September 20, 2011, MacDonald filed a Request for Hearing (DE-175) in which he stated that "[u]ltimately 2006 DNA test results demonstrated that Malone had made another false statement in his February 14, 1991, affidavit [DE-10(8)] when he concluded that a hair found

[6] While the case was pending before the Fourth Circuit, Mr. Cormier filed on MacDonald's behalf a motion asking for a PFA to file another habeas motion and for DNA testing. On October 17, 1997, the Fourth Circuit granted "the motion with respect to DNA testing . . . [and remanded] this issue to the district court. In all other respects, the motion to file a successive application [was] denied." DE-67. Later, the Fourth Circuit issued an opinion affirming the district court's refusal to reopen the 1990 § 2255 proceedings. *United States v. MacDonald*, 161 F.3d 4, 1998 WL 637184 (4th Cir. 1998). This Court concluded that the Fourth Circuit had mandated that the Government provide access for DNA testing to the existent and known unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in Cormier Affidavit #2. DE-86 at 3. On March 10, 2006, the Armed Forces DNA Identification Laboratory (AFDIL) provided the DNA results, which were immediately filed with the court. DE-123-2.

under Colette MacDonald was Jeffrey MacDonald's. **The DNA tests on the hair showed that it belonged to an unidentified individual**." DE-175 at 2, n.1 (emphasis in original). MacDonald requested the live testimony of several witnesses, one of whom was Michael Malone. Id. at 5. In support of that request, MacDonald stated, in pertinent part, "Malone's testimony in other cases has led to convictions being overturned due to misrepresentations made by Malone during trial." Id. However, MacDonald chose neither to call Malone as a witness nor to depose him, even though this Court gave him every opportunity to do so. See Section 5 below.

4. 2011 Affidavit of Joseph A. DiZinno

In response to the defendant's Request for Hearing and other motions, the Government filed the Affidavit of Joseph A. DiZinno (DE-218), former Assistant Director for the FBI's Laboratory Division. Dr. DiZinno had also examined Q-79 (later designated AFDIL 75A for purposes of DNA analysis), the same hair examined by Malone and found by him to have "the same individual microscopic characteristics" as the known exemplar of Jeffrey MacDonald and to be "consistent with having originated from [him]." DE-10(8) at ¶14. Dr. DiZinno confirmed Malone's conclusions regarding the microscopic hair comparison, and noted—as had Malone—that this was not a basis for absolute personal identification. DE-218 at ¶ 17, DE-10(8) at ¶10. Further, DiZinno, having been advised that the AFDIL DNA results for Q-79 (AFDIL 75A) were not consistent with Jeffrey MacDonald, concluded that "Jeffrey MacDonald [was] not the donor of this hair …." DE-218 at ¶18. DiZinno also cited a 2002 article in the *Journal of Forensic Science* that explained "although not common . . . it is possible for two hairs to exhibit the same microscopic characteristics, although subsequent DNA comparison demonstrates they originated

from different donors." DE-218 at ¶19. In the series of filings that followed, MacDonald did not further address the affidavits of either Malone or DiZinno. See DE-261.[7]

5. 2012 Order inviting depositions

In an Order dated June 8, 2012, this Court invited the parties to identify individuals they wished to depose in preparation for the upcoming evidentiary hearing. DE-266 at 4. The defendant responded with a list of nine (9) individuals that did not include either Michael Malone or Joseph DiZinno. DE-269 at 1. The only scientific expert witness MacDonald sought to depose was Janice Glisson, a retired USACIL chemist who, in 1971, had noted the existence of the blond synthetic fibers made to look like hair (which were later determined by FBI examiner Robert Webb to be saran (DE-10(8) at ¶13)). The Court allowed the defendant to depose Glisson, but MacDonald elected not to do so. See DE-273.

6. 2012 Evidentiary Hearing evidence

The evidentiary hearing that led to the Order that MacDonald now seeks to alter took place September 17-25, 2012. During the hearing, MacDonald presented no evidence concerning saran fibers, never mentioned Michael Malone, and never called any witnesses in support of his "unsourced hairs" claim or his argument that the saran fiber was cosmetic wig hair. See HTr. 1-1422. Although any issue regarding Malone was ripe to be addressed, MacDonald made a tactical choice to pursue instead the "Britt claim" and the "unsourced hairs" claim, based solely on the stipulated 2006 DNA results.

7. 2013 Post-Hearing briefs

[7] Although MacDonald mentions in passing that the 2014 OIG Report criticizes Malone's human hair comparisons, see DE-357 at 3, 4, his motion does not connect this to any argument about the MacDonald case. Instead, MacDonald relates his continued focus on Malone's credibility to his now decades-old disagreement with Malone's contention that the saran fibers found in Colette MacDonald's hairbrush were not likely to have come from a cosmetic wig for humans. See DE-357 at 2-3, 5. This issue has been dealt with thoroughly in the Government's post-hearing briefs (DE-344 at 159-164, DE-352 at 12, n.14) and this Court's July 24, 2014, Order (DE-354 at 69-71, 127, 136).

After the evidentiary hearing, the parties filed a series of briefs addressing issues raised at the hearing as well as the entire record of the "evidence as a whole." See DE-336 (Defendant's Post-Hearing Memorandum), DE-343 (Defendant's Substitute Post-Hearing Memorandum), DE-344 (Government's Post-Hearing Memorandum), DE-351 (Reply to Government's Post-Hearing Memorandum), DE-352 (Government's Post-Hearing Sur-Reply). Although he did not mention Malone at the hearing, MacDonald discussed Malone's involvement in the case in his post-hearing briefing. Importantly, MacDonald indicated that he was aware of the recent inquiry into Michael Malone's work at the FBI Lab that is later discussed in the 2014 OIG Report: "[t]he Department of Justice and FBI spent the last several years reviewing Michael Malone's work-product and trial testimony to determine whether Malone provided invalid, unreliable, or false hair identification testimony. *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept,*. Wash. Post, April 1, 2012 at 1." DE-343 at 51 (emphasis in original). Further, MacDonald noted, "[t]he DOJ criticized Malone's testimony because he failed to perform his tests in a scientifically acceptable manner. The DOJ also claimed that Malone's hair statistics overstated the hair evidence's significance." Id. MacDonald also addressed Malone's examination of the saran fibers in this case. Id. at 50.

The Government responded to these allegations with a full exposition of the history of the evidence in this case related to Malone and saran fibers, which is incorporated herein by reference. See DE-344 at 159-164.

8. 2014 Order

On July 24, 2014, after conducting the evidentiary hearing and allowing extensive post-hearing briefing, this Court issued a 169-page Order thoroughly examining all of the evidence present in the 44-year litigation history of this case—the "evidence as a whole"—in accordance

with the mandate of the Fourth Circuit. MacDonald, 641 F.3d at 612 ("unbounded by the rules of admissibility that would govern at trial—based on all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial. Or, to say it another way, the court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules].") (internal quotations and citations omitted). Included in this consideration were all of the aforementioned evidence and arguments related to the saran fibers, Michael Malone, the 1997 OIG Report, and the related media articles cited by the defendant. See DE-354 at 69-71, 127, 133-136. Michael Malone's credibility issues, particularly with reference to their effect on this case, have, therefore, been fully considered by this Court. Any new information contained in the July 2014 report does not warrant amending the judgment pursuant to Rule 59(e).

B. The 2014 OIG Report does not change the analysis regarding Malone's impact on the MacDonald case

Although the 2014 OIG Report contains a more in-depth analysis of Malone's "scientifically unsupportable lab reports and…false, misleading or inaccurate testimony at criminal trials," the MacDonald case was not included in the cases examined as a part of forming that conclusion. See DE-357-1 at 53. The purpose of further examining Malone's work in the 2014 report was "to expos[e] a major deficiency in the Department's implementation of the Task Force's mission," and did not contain any new details relevant to the MacDonald case. Id. The 2014 OIG Report's conclusions regarding Malone's credibility, and thus his usefulness in criminal trials, are the same as those contained in the 1997 OIG Report, only with additional examples.

In understanding how this relates to the MacDonald case, it is important to note again that Michael Malone did no pretrial lab work on evidence in this case and did not testify at the trial of Jeffrey MacDonald. Therefore, none of the evidence considered by the jury was tainted by any later challenge to Malone's credibility. See supra at 2, n.3.

The saran fiber examinations conducted by Malone have been fully challenged and explored throughout the past eighteen (18) years. None of the additional facts present in the July 2014 OIG Report, when considered alongside the entire record of this case, change this Court's conclusion that:

> The origins of the hair and fiber evidence have several likely explanations other than intruders. Furthermore, the cumulative evidence regarding the saran fibers found in Colette's hairbrush can be viewed as "equivocal" as to whether the fibers originated from a wig or a doll. Ultimately, the saran fiber evidence engenders speculation as to the origin of the fibers; it by no means compels a conclusion that the three blond saran fibers are a product of Stoeckley brushing her wig with Colette's hairbrush[8]….

DE-354 at 135-136 (internal citations omitted).

IV. The Court's ruling regarding a Certificate of Appealability should remain unchanged

In order to be granted a certificate of appealability, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits…[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable

[8] There has never been any nexus established between the saran fibers from the hairbrush and any wig Stoeckley may have had. Similarly, if saran wigs were, in fact, manufactured "routinely" as MacDonald claims, he has never offered an exemplar to support this contention. Moreover, MacDonald asserts in his Rule 59(e) motion that "[s]ynthetic hairs possibly coming from a wig would have been powerful corroborating evidence of intruders as Dr. MacDonald's consistent accounts of the evening included a female intruder who appeared to be wearing a wig with long blonde hair." DE-357 at 2-3. This assertion is completely unsupported by the record. The Government is aware of no account in which MacDonald stated that the intruder was wearing a wig; rather, this contention came into play when it was discovered that Helena Stoeckley actually had medium-length *dark* hair and not the long blond hair that MacDonald ascribed to the female "intruder." At trial, MacDonald was asked by his attorney to describe the female intruder. He stated: "I saw a white, floppy hat, blond hair. She did not appear to be heavy." TTr. 6588. At no time did he use the word "wig."

or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where the district court denies relief on procedural grounds without reaching the petitioner's underlying constitutional claim, this showing of debatability must be made not only as to the claim of denial of a constitutional right, but also as to the procedural ruling. See id. at 484-485. In its Order, the Court found that MacDonald had not "met his burden under § 2255(h)(1)'s procedural gatekeeping bar," and, in the alternative, he did not succeed on the merits of either of his constitutional claims or his freestanding claim of actual innocence. DE-354 at 152-153. This Court, after reciting the governing Supreme Court standard from Slack, determined that "MacDonald has not made the requisite showing" for a certificate of appealability. DE-354 at 169. Nothing presented in MacDonald's Rule 59(e) motion indicates that this conclusion is debatable or wrong.

A. Defendant has not made a "substantial showing of the denial of a constitutional right"

Although MacDonald argued that he need not prove a constitutional violation to succeed on the merits of any of his claims, the Court disagreed, and considered both the "Britt claim" and the "Footnote claim" to have constitutional implications. DE-354 at 130, 154-162. The Court considered carefully the evidence put forth by the parties regarding the allegations contained in the Britt claim and found no constitutional violation. See DE-354 at 137-158.[9] Similarly, after allowing MacDonald's perceived motion to amend to assert a third claim—the "Footnote claim"—the Court found that the Government had not withheld any exculpatory evidence in violation of Brady and therefore MacDonald had not demonstrated any constitutional violation on that score. Id. at 129, 158-162. MacDonald's second claim, the "DNA claim" was not based

[9] "The court concludes that MacDonald has not shown that either his Fifth or Sixth Amendment rights were violated, because he has failed to show by a preponderance of the evidence, that Stoeckley confessed to Blackburn, or that Blackburn intimidated her into changing her testimony…[T]he court finds Britt's sworn statements, as a whole, to be unreliable and incredible, and specifically finds his assertions as to Stoeckley's confession to Blackburn and Blackburn's threat to be untrue...Having found that MacDonald has failed to show that Stoeckley confessed to Blackburn, the court also finds that MacDonald has not shown that Blackburn misrepresented to the court the substance of the prosecution's interview with Stoeckley." DE-354 at 156-157.

upon a constitutional violation; rather, it was asserted as a freestanding claim of actual innocence. Id. at 162. It, too, was denied. Id. at 164. ("[T]his court will assume, *arguendo*, that a freestanding actual innocence claim is cognizable. The court nevertheless finds that MacDonald has not met the 'extraordinarily high' burden required for this court to grant the relief he requests.")

The Court did not come to these decisions lightly. It held to the letter of the Fourth Circuit's mandate and considered the 44-year history of litigation in this case, any evidence that the parties wished to present at the evidentiary hearing, and any evidence that the parties wished to present in post-hearing briefs. Still, the Court found that "[n]one of the new evidence, considered against the whole panoply of evidence that MacDonald has marshaled over the past forty-plus years as well as the evidence presented at trial, would preclude a reasonable juror from finding him guilty." DE-354 at 133.

In his Rule 59(e) motion, MacDonald does not mount any challenge to this extensive analysis; rather, he rests his argument upon several quotations from judges who have been called upon to considered this case in the past, taking the quotes out of context. DE-357 at 8.

With regard to Judge Murnaghan's "uneasiness" comment, it should be noted that the context was Judge Murnaghan's view that, even though he agreed there was no abuse of discretion, had he been the trial judge, he would have admitted the hearsay statements of Helena Stoeckley proffered by the "Stoeckley witnesses." United States v. MacDonald, 688 F.2d 224, 236 (4th Cir. 1982) (Murnaghan, J., concurring). Judge Murnaghan later joined in a unanimous opinion of the Court of Appeals affirming the denial of MacDonald's second habeas in 1992, saying:

> The evidence simply does not escalate the unease one feels with this case into a reasonable doubt. … Here, over twenty years after the event of the crime,

> MacDonald reopens his case with specious evidence. While we are keenly aware of MacDonald's insistence as to his innocence, at some point we must accept this case as final. … Any evidence truly pointing to MacDonald's innocence would have prompted a review on the merits by this Court.

United States v. MacDonald, 966 F.2d 854, 860-61 (4th Cir. 1992). The quoted passage from Judge Murnaghan, therefore, cannot be said to render this Court's recent decision conclusion debatable or wrong.

MacDonald also cites a 1979 letter from Judge Dupree to Wendy Rouder (DX 5115) that Ms. Rouder produced for the first time at the 2012 hearing. During the trial, Judge Dupree, who had admired the writing skills of Ms. Rouder, responded to her expressed interest in a law clerkship by encouraging her to apply for one. She apparently did, and this letter was a polite rejection of her application for such a position. He explained that in light of the jury's guilty verdict, she would "doubtless keep working on [the case]" and that would preclude his hiring her. He opined that when he made the comment to Rouder during the trial, he had anticipated that the jury would render a not guilty verdict. This comment is not contained in any order or opinion written by Judge Dupree and cannot be viewed as a judicial conclusion regarding the case. Moreover, Judge Dupree's opinions in this case make clear that he viewed the guilt/innocence decision to be the province of the jury, not his. United States v. MacDonald, 640 F.Supp. 286, 315 n.16 (EDNC 1985). This has nothing to do with the legal issues on which this Court has ruled.

MacDonald has failed to cite any legitimate basis for the assertion that the Court's conclusions in its July 24, 2014 Order are debatable or wrong, and has therefore failed to make a substantial showing of the denial of a constitutional right. He must, therefore, be denied a certificate of appealability.

B. The MacDonald case is distinguished from the proffered cases regarding the issuance of certificates of appealability in cases involving claims of actual innocence

MacDonald makes one last attempt to gain a certificate of appealability by stating that, "courts have very recently granted certificates of appealability on issues involving claims of actual innocence and the emerging legal standards regarding them." DE-357 at 9. The cases he cites in support of this statement, however, do not stand for this proposition. MacDonald's reliance on Stewart v. Cate, 757 F.3d 929 (9th Cir. 2014) is misguided. In Stewart, the Ninth Circuit Court of Appeals was divided regarding whether the petitioner had made a sufficient showing to have his actual innocence claim considered. We have no such division in this case, which renders it inapplicable to the Court's consideration of MacDonald's certificate of appealability.

Also cited for this proposition is United States v. Baxter, 2014 WL 3882427 (D.C. Cir. 2014). Contrary to the statement in MacDonald's parenthetical—"granting certificates on two claims of actual innocence"—Baxter did not actually receive a certificate of appealability on a claim of actual innocence. The D.C. Circuit Court granted a certificate of appealability regarding the conspiracy count because the jury returned a general verdict when instructed on alternative theories of guilt, not on a freestanding claim of actual innocence. Id. at 5. In order to then succeed on the merits, Baxter had to overcome his procedural default by demonstrating his actual innocence, which he was unable to do. Id. at 6-8.

MacDonald has been unable to posit any cogent argument that he has made a substantial showing of the denial of a constitutional right. Nor has he presented anything in his Rule 59(e) motion to demonstrate that the Court's conclusions were debatable or wrong. Therefore, he should not be granted a certificate of appealability.

V. Conclusion

For the foregoing reasons, the Government respectfully requests that this Court deny defendant's motion pursuant to Fed. R. Civ. P. 59(e).

Respectfully submitted, this the 11th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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